No. 14-981

In the Supreme Court of the United States

ABIGAIL NOEL FISHER, PETITIONER

v.

UNIVERSITY OF TEXAS AT AUSTIN, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF OF NATIONAL ASSOCIATION OF BASKETBALL COACHES, WOMEN'S BASKETBALL COACHES ASSOCIATION, THE NATIONAL ASSOCIATION FOR COACHING EQUITY AND DEVELOPMENT, GENO AURIEMMA, JIM BOEHEIM, JOHN CHANEY, JODY CONRADT, TOM IZZO, MIKE KRZYZEWSKI, JOANNE P. MCCALLIE, GEORGE RAVELING, NOLAN RICHARDSON, SUE SEMRAU, ORLANDO "TUBBY" SMITH, JOHN R. THOMPSON, JR., TARA VANDERVEER, DICK VITALE, COQUESE WASHINGTON, AND GARY WILLIAMS AS AMICI CURIAE IN SUPPORT OF RESPONDENTS*

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BRIEF OF NATIONAL ASSOCIATION OF BASKETBALL COACHES, ET AL. AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

Amici curiae[1] respectfully submit this brief in support of Respondents.[2]

INTEREST OF AMICI CURIAE

Amici are organizations representing over 7,500 current and former collegiate head and assistant basketball coaches and athletic administrators involved at the National Collegiate Athletic Association (NCAA), the National Association of Intercollegiate Athletics

[1] Individual signatories are expressing their own views, and are not signing on behalf of the institutions where they work or have worked.

[2] All parties have consented to the filing of this amicus curiae brief. No counsel for any party authored this brief in whole or in part, and no person or entity, other than amici curiae or their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

(NAIA), and community college levels, as well as 285 current and former college head basketball coaches. Taken as a whole, amici represent thousands of years of collective experience teaching, coaching, and advising student-athletes at all levels of the game.

We are well-aware of our role within the larger university context, often as one of the public "faces" representing the university. Our student-athletes are just that: students and athletes, and they regularly interact on campus with athletes and non-athletes alike. And while our student-athletes have athletic talents, they often have other talents as well, be it research, art, music, or other disciplines found on the modern campus. We understand—from our work every day—the value that diversity and increased perspectives give our student-athletes and the campus community as a whole, and we appreciate the opportunities that a diverse academic environment affords our players. Finally, in our role as members of the broader university community, we have experienced first hand the advantages of having a diverse student body, and how students of all backgrounds take the lessons learned from living in such an environment to communities beyond the confines of campus.

The National Association of Basketball Coaches (NABC) represents 4,486 coaches from around the country and from every level of basketball. Started in 1927, the NABC has tracked this nation's evolution on issues related to race and diversity, and has made particular efforts in recent years to ensure that leadership in our athletic departments (both administration and coaching) reflect the considerable diversity of our teams. The Women's Basketball Coaches Association

(WBCA) represents 3,013 women and men who coach women's and girls' basketball on every competitive level of the sport and has worked to expand educational, professional, and athletic opportunities for female players of all races and backgrounds since its founding in 1981. The National Association for Coaching Equity and Development (NAFCED) is a membership organization dedicated to empowering, developing and advancing the professional careers of racial and ethnic minority coaches in athletics. NAFCED has over 100 members, many of whom are also signing individually.

While all of the amici support the values expressed herein, four in particular should be highlighted for their role in personifying the ideals that we teach on a daily basis. One is John R. Thompson, Jr., who coached at Georgetown for 27 years, won a National Championship in 1984, and was elected to the Naismith Memorial Basketball Hall of Fame (the Hall of Fame) in 1999. He served as President of the NABC in 1985-86. Thompson grew up in Washington, D.C. in the late 1950s. His mother was not allowed to teach in the D.C. public school system despite having her teaching certificate; instead, she cleaned houses for a living, while his father worked as a mechanic in a tile factory. "Big John" was a leader in bringing opportunity to student-athletes who might not otherwise have had the chance, building on his own experience:

> If I weren't given an opportunity, if someone hadn't given me the chance to attend Providence, and then become a coach, my three kids would have never had a chance. It's a vicious cycle. We

> only look at the kids who don't make it.
> What about the kids who do?

Dick Vitale[3] & Dick Weiss, *Holding Court: Reflections on the Game I Love* 176 (1995). Of the 77 players who played all four years at Georgetown for Thompson, all but two earned their degrees. Naismith Memorial Hall of Fame (HOF), John R. Thompson Biography, http://tinyurl.com/ohj4nku (last visited Oct. 25, 2015). Thompson was not only a teacher, but also a role model who embodies the values that we seek to promote.

Nolan Richardson is another amicus. He was raised by his grandmother in a primarily Mexican neighborhood in El Paso, Texas. Richardson was the first black student at Bowie High School in the early 1960s, and "had to put up with all sorts of instances of racism and segregation." Vitale, at 183. After working his way up through the coaching ranks of high school, junior college, and the mid-majors, Richardson became the first black coach in the old Southwest Conference, at Arkansas, in 1985. *Ibid.* He won a National Championship in 1994, and was elected to the Hall of Fame in 2014. HOF, Nolan Richardson Biography, http://tinyurl.com/njn3spg (last visited Oct. 25, 2015). A pioneer throughout his life, he remained an outspoken advocate for those born into difficult circumstances.

John Chaney, a third amicus, grew up so poor that when he won the Philadelphia Public School Player of the Year award, he could not afford a sports jacket to

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[3] Amicus Vitale was elected to the Hall of Fame in 2008. Naismith Memorial Hall of Fame (HOF), Dick Vitale Biography, http://tinyurl.com/q6wsrf3 (last visited Oct. 25, 2015).

attend the dinner. Vitale, at 182. After a brilliant college career, his professional prospects topped out in the Eastern League because of limitations on his access to the NBA. *Id.* at 183. Subsequently, Chaney transitioned into coaching, moving to Temple in 1982, where his 6:00 AM practices were legendary. Instead of accepting defeat after becoming a victim of exclusion, Chaney built a career teaching and inspiring others. He entered the Hall of Fame in 2001. HOF, John Chaney Biography, http://tinyurl.com/ozbb9n9 (last visited Oct. 25, 2015).

After a brilliant playing career at Villanova, George Raveling began a coaching career that took him across the country. He was the first African-American assistant in the Atlantic Coast Conference, and later the first African-American head coach in what is now the Pac-12 Conference. In addition, he is linked to one of the seminal moments in the Civil Rights movement: on August 28, 1963, Raveling volunteered to work security at the March on Washington. As Martin Luther King, Jr., finished the "I have a Dream" speech, he passed Raveling and handed him the text of the speech. Raveling still has the manuscript. Seth Davis, *Pioneering Coach George Raveling's Surprising Connection to MLK*, Sports Illustrated (Jan. 19, 2015), http://tinyurl.com/lrl5exe. He served as President of the NABC in 1995-96 and was elected to the Hall of Fame this year. HOF, George Raveling Biography, http://tinyurl.com/ntcx8lc (last visited Oct. 25, 2015).

Finally, we mention two former colleagues and Hall of Famers who exemplify the spirit that animates all of the amici. The first is the late Dean Smith, who served as President of the NABC in 1981-82, and won two Na-

tional Championships at the University of North Carolina-Chapel Hill, mentoring and coaching generations of student-athletes, including Michael Jordan. Coach Smith earned a reputation as having "proven [his] respect for the black athlete." Arthur S. Ashe, Jr.,[4] et al., *A Hard Road to Glory: A History of the African-American Athlete Since 1946* 63 (1988). As a lowly assistant coach in the summer of 1959, Smith was asked by the pastor of his church to help integrate a popular restaurant in Chapel Hill by dining there with a black student. John Feinstein, *A March to Madness: The View From the Floor in the Atlantic Coast Conference* 188 (1998). Smith's memoir continues the story:

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[4] Ashe was both author and pioneer. John McPhee, *Levels of the Game* 45 (1969) (On comparisons with Jackie Robinson: "[T]he analogy is weak and foreshortens the story. Jackie Robinson was part of a pool of many hundreds of first-rate baseball players, and was chosen from among them * * *. Arthur, at the age of seventeen * * * stood, as he has remained, alone."). Ashe also stands as an example of how an athlete's life can help bridge racial divisions. In 1995, when the Richmond City Council voted to add a statute of Ashe to the city's Monument Avenue, which contains statutes of Confederate war heroes, it represented a turning point in Richmond's history. The Ashe statute also has been oft referenced in connection with the recent debate over the appropriateness of the public display of Confederate symbols in the wake of the Charleston, South Carolina shooting. *See* Graham Moomaw, *Symbols That Divide*, Richmond Times-Dispatch, June 28, 2015, at 1A. During the 1990s, amicus NABC (with others) petitioned the NCAA to stop assigning NCAA championships to sites in states where the Confederate flag is flown on Capitol grounds. The NCAA honored the request in 2001, and no championship sites in any sport have been awarded in those states to this day. NCAA, Statement on Confederate Flag Moratorium (Nov. 11, 2004), http://www.nabc.org/sports/m-baskbl/spec-rel/111104aab.html.

> I was an appropriate one to go because it was a tradition for the basketball team to eat pregame meals there. * * * I have read accounts that claim we were received with stunned silence and glares, but I do not think that was the case. The only thing a little awkward was a slight delay in seating us as the hostess sized up the situation and looked to the manager for a signal about how to proceed.

Dean Smith, et al., *A Coach's Life* 95-96 (1999).[5]

The second[6] is the late John Wooden of UCLA, who remains the most successful men's coach in Division I history with ten NCAA titles.[7] Wooden recognized that working together—in the basketball context—requires racial understanding in both directions (player-to-coach and coach-to-player):

> Dad helped set my thinking in place on the issue of race. He told me and my brothers many times, "You're just as

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[5] Consistent with his modesty and self-awareness, Smith downplayed the incident throughout his life: "If I had been truly courageous * * * I would have gone to every black high school gym in the state looking for players." J. Samuel Walker, *ACC Basketball: The Story of the Rivalries, Traditions, and Scandals of the First Two Decades of the Atlantic Coast Conference* 246 (2011).

[6] Like Dean Smith, Wooden was recognized by Arthur Ashe for his "respect" for black athletes. Ashe, at 63.

[7] Amicus Geno Auriemma has tied Wooden's mark with the UConn women's team. HOF, Geno Auriemma Biography, http://tinyurl.com/py9p2qh (last visited Oct. 25, 2015).

> good as anyone, but you're no better than anybody."

Coach John Wooden & Steve Jamison, *Wooden: A Lifetime of Observations and Reflections On and Off the Court* 156 (1997).

Our occupation gives us insight into the questions the Court grapples with today. On the one hand, we are part of academia, and ultimately our role is to educate young men and women. On the other hand, our educational role is within the most competitive of environments—and one where there are winners and losers. Many of us have competed against each other on the court, but we join together here.

Coaching in the university context is unique in another way: many of us operate in "majority-minority" environments, and all of us have teams with diverse members. Finally, almost all of us know, first-hand, the difficult and challenging areas that still exist in this country, often in urban environments; some of us are from those areas personally, and nearly all of us have made recruiting trips there in our professional capacity. We are not writing as dilettantes or tourists. We live this life.

We also write with a degree of self-interest, in this indirect but important way: the Court's ultimate decision in this case will probably not impact our recruiting or player selection—other rules and requirements control those activities. But we know that an adverse decision in this case will hurt our players, making them less connected to and more isolated from their university communities. And it will hurt the communities themselves, as diverse viewpoints and interactions will

be fewer in number, as we have seen in those states that have abolished affirmative action through ballot initiatives, because fewer minorities are admitted. Prohibiting universities from considering race, alongside many other factors, when evaluating a candidate for admission to a college or university, will have significant deleterious effects, and will put severe limits on the types of positive outcomes we discuss here.

INTRODUCTION AND SUMMARY

In remanding to the Fifth Circuit, this Court queried whether the undergraduate admissions program at the University of Texas at Austin (UT-Austin) that allows for race-conscious holistic review of applicants not automatically admitted under the Texas Top Ten Percent Law is sufficiently "narrowly tailored to obtain the educational benefits of diversity." *Fisher* v. *Univ. of Tex. at Austin*, 133 S. Ct. 2411, 2421 (2013) (*Fisher I*). This Court will determine whether the UT-Austin admissions program meets the strict scrutiny test as called for in the remand order. *Id.* at 2421-2422.

In analyzing the UT-Austin admissions program, it is important to remember that about three-quarters[8] of the UT-Austin class is filled via the "Top Ten Percent,"[9] which does not consider race in any manner (although

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[8] For instance, in 2008, this group comprised 81% of the UT-Austin class. After legislative revisions, this group was down to 77% for the class of 2013. *Fisher* v. *Univ. of Tex. at Austin*, 758 F.3d 633, 654-655 (5th Cir. 2014) (*Fisher II*).

[9] Because of legislative limits on the number of "automatic admissions," over recent years, the number has been Top 9% (Fall 2012 applicants) and Top 7% (Fall 2014 and Fall 2015 applicants). *Fisher II*, 758 F.3d at 655-656.

its degree of effectiveness arises from the profound segregation in Texas high schools). The balance of the class is filled via a holistic review like that previously endorsed by this Court, of which race is but one factor. See *Grutter* v. *Bollinger*, 539 U.S. 306, 344 (2003); *Regents of Univ. of Cal.* v. *Bakke*, 438 U.S. 265, 317 (1978). This complementary two-part admission system, providing essentially a second-bite-at-the-(admissions)-apple for those Texas residents who finish outside the top 10% of their high school class, is narrowly-tailored to ensure that those who achieve a standing among the top 10% of their class will gain admission to UT-Austin, while the remaining spaces are filled with a group of students from varied backgrounds and experiences to fulfill the court-recognized educational benefits of, and interests in, diversity.

The holistic admission review that was approved by *Grutter* and *Bakke* is vital to ensure diversity. *Grutter*, 539 U.S. at 341; *Bakke*, 438 U.S. at 317. College basketball—with diverse teams—offers a microcosm of the academic community that these decisions envisioned. And our collective experiences allow us to identify increased perspectives, opportunities for professional development, and greater citizenship, the very goals that were endorsed by *Grutter* and *Bakke*.

While this Court has asked a narrow question on remand (whether the UT-Austin admissions program is "narrowly tailored"), we write to provide context. The dimensions of what level of tailoring is acceptable must be measured in light of what diversity adds, and what will be lost if the Fifth Circuit's decision is reversed. We write to provide real-life examples—qualitative evidence—of how the goals of diversity, and the educa-

tional value it provides, benefit both the classroom, and the society that students enter after college.

ARGUMENT

I. THE VALUES EXPRESSED BY THE *GRUTTER* V. *BOLLINGER* COURT ARE SUPPORTED BY OUR COLLECTIVE EXPERIENCE

A. Athletics Has Long Played A Key Part In Increasing Perspectives Across Diverse Groups, Both Within The Team Itself And In The Population At Large

The Court in *Grutter* v. *Bollinger* held that one of the key reasons why a "critical mass" of minorities is vital is the increase in perspectives brought to the classroom when students have "the greatest possible variety of backgrounds." 539 U.S. 306, 329-330 (2003) (citation omitted). The classroom that the *Grutter* Court envisions—of which our teams are a microcosm—is not often portrayed in a qualitative manner. But the history and exposure that we represent is documented widely due to popular culture's interest in college sports. This documentation gives us examples that show how broadly perspectives can be changed through increased diversity. No matter one's opinion of sports, its broad appeal throughout our nation provides insight into this issue in a way that is difficult to find in other arenas.

In the late 1950s and early 1960s, the State of Mississippi refused to allow its teams to play in the NCAA Tournament because of the likelihood that they would play against integrated teams. Three times in four

years (1959,[10] 1961, and 1962) Mississippi State (MSU) won the Southeastern Conference but declined an invitation to the NCAA Tournament. Kyle Veazey, *Champions for Change: How the Mississippi State Bulldogs and Their Bold Coach Defied Segregation* 40-41 (2012). In 1962, the SEC second-place team accepted a berth in the Tournament instead, and ended up playing Ohio State. One of the MSU players went to watch the game and said:

> That's the first time I really understood * * *. We could have been there. We deserved to be there. And certainly when you are setting [sic] up in the stands watching them play, you realize what you're missing out on.

Michael Lenehan, *Ramblers: Loyola Chicago 1963—The Team that Changed the Color of College Basketball* 121 (2013).

Another teammate put it more directly:

> We would have got [sic] to play against Ohio State, the Big Ten champions. We would have got [sic] to play against John Havlicek, Jerry Lucas, Bobby Knight.[11] * * * [W]hat a treat that would be, to see how good we were compared to them.

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[10] The 1958-59 team was 24-1 and was ranked 4th nationally. Kyle Veazey, *Champions for Change: How the Mississippi State Bulldogs and Their Bold Coach Defied Segregation* 40-41 (2012).

[11] Havlicek, Lucas, and Knight (as a coach) are all Hall of Fame members. HOF, Hall of Famers, http://tinyurl.com/y987289 (last visited Oct. 25, 2015).

Ibid.

In September 1962, James Meredith became the first black student at the University of Mississippi, enrolling under the protection of federal marshals. Charles H. Martin, *Benching Jim Crow: The Rise and Fall of the Color Line in Sourthern College Sports, 1890-1980* 245 (2010). Meanwhile, over at MSU, Coach Babe McCarthy had another strong team that winter, and he began lobbying both privately and in the press for entry in the Tournament. Lenehan, at 193-194. Not trusting the state legislature or Mississippi's College Board,[12] Dean Colvard, the then-President of the school, unilaterally overturned the so-called 'unwritten law' that prevented participation in the Tournament, and on March 2 announced (just before the final game of the regular season) that the team would accept an invitation "unless hindered by competent authority." Veazey, at 85-86 (statement by D.W. Colvard).

Events moved rapidly, and the media reported each development.[13] The College Board held a special meeting and rejected a motion to refuse the invitation on March 9. Lenehan, at 202. On March 11, Loyola of Chicago advanced over Tennessee Tech, 111-42, earning the right to play the SEC representative. Veazey, at 89. MSU continued to practice in Starkville.

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[12] Officially, the Board of Trustees of the Institutions of Higher Education of the State of Mississippi. Lenehan, at 196.

[13] *E.g.*, the *Jackson Daily News* reported that Georgia Tech, which would accept the bid if MSU declined, was "practicing like mad." *Id.* at 203.

On March 13, the night before the MSU team was to leave for the NCAA Tournament, word came down that an injunction had been obtained that would prevent participation in the game. Colvard and Coach McCarthy left Mississippi to avoid being served by county officials.[14] Lenehan, at 211-212. MSU chartered two planes, on the chance one would be enjoined from take-off, but in the end arrived in East Lansing, Michigan for the Regionals.[15] *Id.* at 212, 214.

Arriving at their hotel, the players were settling into their rooms when one heard a thud at the window. He recalled later:

> A snowball or two [had] hit our window. I went to the window, and if I'm not mistaken it was three young black girls. And I stepped out on to the balcony, and they were kind of smiling, you know, and they said, "Are you the guys from Mississippi?" And I said, "Yes, we are * * *." And I don't remember exactly what the young lady said but it was something to the effect of "Well, you don't look like a monster to me. You look normal."

Lenehan, at 217-218.

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[14] Colvard and a colleague went to Alabama; McCarthy (with the athletic director) drove to Tennessee. Lenehan, at 211.

[15] When the plane took off, one of the players said: "Now I know how those East Berliners feel when they make it past the Wall." Martin, at 251.

Loyola defeated MSU *en route* to winning the 1963 NCAA championship. But the story is important for two reasons: first, the previous year, the MSU players were forced to understand what the absence of diversity can mean. Perversely, Mississippi's "unwritten rule" meant that MSU's players were punished and were not able to test themselves against the one of the best teams of the era (Ohio State ultimately lost in the 1962 NCAA title game). Paralleling Coach Thompson's comments, MSU's absence from the Tournament—and the game that was not played against Ohio State was "the dog-that-didn't-bark."[16]

Second, the interaction between the MSU player and the three girls at the Michigan hotel demonstrates what the *Grutter* Court was referencing: the interplay between people with different backgrounds that can increase perspectives. On the part of the MSU players, it meant understanding how their home state was being perceived in other parts of the country. For the three girls in Michigan, it was that these players from Mississippi—who effectively had been slandered in the local media—were, in fact, not the "monsters" they had heard about.

A few years later, the college basketball world changed forever, when the 1966 NCAA Division I title game featured an all-white Kentucky team playing a Texas Western squad that started five African Americans. Texas Western won, and ushered in a new era in the sport:

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[16] Arthur Conan Doyle, *The Hound of the Baskervilles* (1902).

> Gary Williams[17] was in [Cole Field House, on the campus of the University of Maryland] that night. * * * [H]e remembers wandering among the Kentucky fans and hearing the word "[N*****r]" over and over. * * * [T]he word upset Williams. "We sat there all night and rooted like hell for Texas Western," he said. "Then, after the game, I remember hearing the Kentucky people saying, 'We gotta get us some of them.'"

Feinstein, at 128.

We can also see how perspectives can be changed in individual student-athletes. This interplay is perhaps best illustrated by the experiences of Earvin "Magic" Johnson and Larry Bird, whose teams played each other for the 1979 Division I Men's Championship, and whose professional basketball careers were also intertwined. To succeed, both men needed to learn to interact and rely on teammates from diverse backgrounds.

Johnson's exposure actually began before he enrolled at Michigan State. When an integration program began in Lansing, Michigan, he could not attend the primarily black high school (Sexton High School) near his home, and instead attended Everett High School, which was 92 percent white. Seth Davis, *When March*

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[17] Amicus Williams later coached Maryland to a national title himself in 2002, and was elected to the Hall of Fame in 2014. HOF, Gary Williams Biography, http://tinyurl.com/oovowzg (last visited Oct. 25, 2015).

Went Mad: The Game that Transformed Basketball 19-20 (2009) (Davis). Johnson himself admitted at the time that he was "upset * * * I wanted to go to Sexton." *Id.* at 20. Johnson's high school coach said that initially, "Racial tension ran high. The white kids didn't want them there, and the black kids didn't want to be there." *Ibid.*

But the same coach later reminisced that:

> Going to Everett over Sexton helped Earvin down the road. I'm convinced of that * * *. He learned how to deal with racial problems. He mingled with white kids * * *. He'd have been a different person at Sexton.

Davis, at 22-23.

Bird's experience was different. The second-best player on the Indiana State team in that era was Carl Nicks, an African American, who had trouble adapting to the local community. Nicks later said:

> I grew up on the South Side in Chicago, and it's like ninety-five percent black there * * * I get down there with these southern Indiana types, and I'm thinking, Where the hell am I? * * * It was hard for me to let down my barriers, because I was in shock for a long time.

Davis, at 30-31.

Shortly after Nicks arrived on campus, Bird decided to organize a squirrel hunting party, and invited Nicks. Nicks later recalled:

> I didn't know nothing about shooting * * *. When I saw a squirrel, I just started firing * * *. And I was scared to death because I thought there might be raccoons or wolves running out there. The other guys were cracking up.

Davis, at 30-31. For his part, Bird (who was famously referred to as the "hick from French Lick"[18]), probably was not exposed to African Americans other than in connection with basketball. While squirrels in southern Indiana were not victimized by Nicks, the team eventually[19] gelled behind Bird and Nicks, and the two ultimately carried ISU to the precipice of a National Championship. Both Bird and 'Magic' needed to find ways to interact with diverse classmates and teammates to achieve the success that elevated them into basketball lore.

The point here is not a history lesson—although this is history worth remembering. Rather, these examples highlight—sometimes in the blink of an eye, and sometimes in the course of a 40-minute game—the increased perspectives that bring "educational benefits." *Grutter*

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[18] Bird grew up in a rural Indiana community, but one with several resorts; he would play basketball with the black hotel employees after work. Earvin "Magic" Johnson & William Novak, *My Life* 229 (1993).

[19] The squirrel-hunting party occurred in Nicks' freshman year at ISU, in 1976-77. For academic reasons, he had to attend a community college during 1977-78. He could have transferred to a different D-1 school for 1978-79, but returned (after some lobbying from Bird) to ISU, where he was the second-leading scorer on the national runner-up team. Davis, at 31-32.

v. *Bollinger*, 539 U.S. 306, 330 (2003); see also *Regents of Univ. of Cal.* v. *Bakke*, 438 U.S. 265, 312-313 (1978). And because of the interest in college basketball, these moments are remembered and preserved.[20] While oftentimes the "educational benefits" occur slowly, hidden away in classrooms or dining halls, in these instances they were made visible. And both our teams, and our academic institutions, are the better for it.

The broader perspective diversity brings in the college basketball world shows no sign of abating, and recent events demonstrate that perspectives, which are enhanced by prior exposure to diversity, continue to evolve. And because our teams are microcosms of diverse university communities, our student bodies are evolving as well. In the spring of 2013, just days after finishing a successful career at Baylor University (including being a three-time All-American selection), Brittney Griner announced she was gay. Chuck Schilken, *Brittney Griner Acknowledges She's Gay, says 'Just be who you are'*, L.A. Times (Apr. 18, 2013), http://tinyurl.com/peuv8tw. A year later, Derrick Gordon of UMass,[21] announced he was gay, becoming the first active player in a major D-1 sport to do so. Cyd Zeigler, *Derrick Gordon Finds His Freedom*, OutSports (Apr. 9, 2014), http://tinyurl.com/q32bhje. And even more recently, Chris Burns, an assistant basketball coach at Bryant University, made a similar announcement, becoming the only openly gay individual among the 3,000 men's and women's D-1 head and as-

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[20] As evidenced by the feature film *Glory Road* about the 1966 Texas Western national championship game with Kentucky.

[21] Now at Seton Hall.

sistant coaches. Scott Gleeson & Erik Brady, *A Coach Comes Out of the Closet*, USA Today, Oct. 7, 2015, at 1C. In each instance, we see opportunities for our teams, and our communities as a whole, to increase perspectives; indeed, the acceptance of gay athletes and coaches—and gay students in the university community—that we have seen over the past few years is evidence of the value that continued diversity instills in us.

B. Team-Building On The Modern Campus Requires Working Together With A Diverse Group Of Student-Athletes, A Model For Working In Today's Professional Environment

The *Grutter* Court states that "student body diversity promotes learning outcomes and better prepares students for an increasingly diverse workforce and society, and better prepares them as professionals." 539 U.S. at 330 (internal citations and quotation marks omitted). Our experience supports this conclusion.

The issues around diversity that we encounter every day do not apply just to minority student-athletes who earn the opportunity to attend an institution of higher learning. In 2013-14, 57.5% of all men's and 45.9% of all women's college basketball players were identified as non-white. NCAA, Sport Sponsorship, Participation and Demographics Search [Student-Athlete Data] (2015), http://tinyurl.com/qe69gbn. For Division 1 players during the same period, the numbers are even more extreme: only 26.8% of men and 33.6% of women were identified as "white." *Ibid.* The world of college basketball is a "majority-minority" environment. That matters because our nation's population—

and therefore our nation's workplace—continues to trend less "white."[22] See Sandra L. Colby & Jennifer M. Ortman, Projections of the Size and Composition of the U.S. Population: 2014 to 2060, U.S. Census Bureau (Mar. 2015).

Ed Hightower was born in a small farming village in the boot heel of Missouri, in a house with a tin roof and no indoor plumbing; an observer described his childhood as having "far more in common with the agrarian nineteenth-century of Mark Twain than the Internet Age." Bob Katz, *The Whistleblower: Rooting for the Ref in the High-Stakes World of College Basketball* 43-45 (2015). After second grade, Hightower began picking cotton with his parents every day in the summer. *Id.* at 49-50.

Hightower's family subsequently moved to Alton, Illinois, where he first had the opportunity to play organized basketball. After a stellar high school career, Hightower attended Southern Illinois—Edwardsville in the early 1970s. When his college playing career stalled, Hightower began to referee intramural games. Katz, at 84-85. Upon graduation, Hightower embarked on two high-level careers: referee and educator.

For years, Hightower's face has been a familiar sight to college basketball fans. Working in the Big

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[22] Or as Senator Bill Bradley (himself a standout player at Princeton) once said: "In Houston, Texas, I saw a recent story about one Korean immigrant restaurant owner who employs Latino immigrant labor to prepare Chinese-style food for a predominantly black clientele." Bill Bradley, Cooper Union Speech on Race (Apr. 20, 1999), http://tinyurl.com/p69angg (starting at approximately 10:30).

Ten Conference, he often has been asked to work the opening round of the NCAA Tournament. For referees, like teams, a good performance means another game in the next round. Katz, at 103. Hightower has worked a total of 12 Final Fours, including seven in a row at one point, and four Championship games. *Id.* at 12.

But Hightower excels at another career. Since 1998, he has been Edwardsville's superintendent of schools, and his performance has been impressive: 96 percent of the 7,600 students graduate from high school, with 64 percent attending four-year colleges. Katz, at 94.

Several messages can be learned from Hightower's careers. First, when his playing career ended, he transitioned.[22] Second, his progression through the refereeing ranks to the top of that profession meant that all of us involved in the game—coaches, players, and fans—see an African American in a prominent position of responsibility and authority. Finally, his "other" career—school superintendent—is another position of authority

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[22] Preparation for the professional environment can also be seen in the world's largest car company, which places an emphasis on hiring former student-athletes. Press Release, Enterprise Holdings, Enterprise Rent-A-Car Looks to Hire Student-Athletes, Partners with Career Athletes (Apr. 25, 2012), http://tinyurl.com/qzxnw6y.

There are two relevant points here. First, Enterprise clearly feels that student-athletes help the company grow. Second, Enterprise believes that its hiring of student-athletes helps its corporate image, and hence it emphasizes the fact in its television advertising. Anthony Crupi, *Enterprise Revs Up March Madness Spot*, AdWeek (Mar. 5, 2012), http://tinyurl.com/ppj69sp.

that seems inconceivable for a boy who otherwise might have picked cotton all his life.

Peter Roby's story echoes these themes. Roby grew up in New Britain, Connecticut and became the first person in his family to attend college when he played basketball for Dartmouth in the 1970s. After his playing career ended, he moved into coaching, and became the head coach at Harvard at age 28. Wesley Harris, Peter Roby Profile, Ivy50.com (Jan. 25, 2007), http://tinyurl.com/pbg3j4r. After some time in the business world, Roby now serves as Athletic Director at Northeastern University, but he continues to see his role as one of promoting diversity:

> I've often been asked if I feel a special obligation to serve as a role model for athletes of color in my role as [Athletic Director] and before as a coach at Harvard. While the obvious answer is yes, I also felt it was important for me to serve as a role model for white students as well because it gave them the opportunity to see a black male in a position of authority and power. Having seen it as an undergraduate, it would be much more natural for them to encounter it as they started their professional careers. Important for them to expect it and respect it.

Email from Peter Roby, Athletic Director, Northeastern University to Matthew T. Henshon (Sept. 21, 2015, 5:08pm ET) (on file with Matthew T. Henshon).

Both Hightower and Roby demonstrate the importance and value of diversity. Both men were unlikely to attend college (or their particular schools) absent their basketball ability; but their presence in those environments surely had influence on their peers. And both have chosen to remain involved in college athletics, allowing the perspectives of subsequent generations of student-athletes to be broadened before they leave campus for the professional environment. As the public service announcement says: "There are over 400,000 NCAA student-athletes, and just about all of us will go pro in something other than sports." NCAA Commercial (RefineryNYC Jan. 21, 2010), http://tinyurl.com/oj3w7f5.

C. Our Student-Athletes, Coming From Diverse And Multi-Cultural Environments, Have Gone On To Serve Our Nation In Varied And Important Fields

Finally, *Grutter* identifies the important role that diversity plays in preparing for "good citizenship"[24] that is vital to our Nation. 539 U.S. at 331 (quoting *Brown* v. *Bd. of Education*, 347 U.S. 483, 493 (1954)). Here too, we agree and draw on our collective experiences to provide qualitative support.

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[24] Also echoed in Jackie Robinson's famous phrase: "first class citizenship." See, *e.g.*, Letter from Jackie Robinson to Vice President Richard Nixon (Feb. 5, 1958) in *First Class Citizenship: The Civil Rights Letters of Jackie Robinson* 49 (Michael G. Long ed., 2007); see also Letter from John F. Kennedy to Jackie Robinson (July 1, 1960) in *id.* at 108 (praising Robinson's "dedication to the achievement of first-class citizenship for all Americans").

College provides opportunities for learning, understanding, and appreciating other cultures, and that is especially true for our student-athletes. Former Senator Bradley wrote that his days as a basketball player—travelling the country with the Knicks in an essentially "black world"—were "one of the most enlightening experiences of my life." Bill Bradley, *Time Present, Time Past* 363 (1996). While Senator Bradley's subsequent career of public service seems a long way from dusty gyms, he would, from time-to-time, draw public parallels between his basketball playing days and the US Senate:

> After I was in the Senate about five months, I was sitting in the Democratic cloakroom at about 11 o'clock at night – we were having late votes. I looked around that cloakroom and I saw one Senator angry, one Senator talking, one Senator walking up and down the floor pacing, one Senator on the telephone, [and] one Senator clearly thinking. I thought to myself, "You know, this isn't a lot different than the Knick locker room." At core, both are a matter of getting different people from different backgrounds with different experiences and different personal agendas to agree on a shared goal and work toward it. That process defines both teamwork and the public interest.

Bill Bradley, *Hall of Fame Enshrinement Speech* (May 2, 1983), http://tinyurl.com/nj2u3fd (starting at approximately 12:55). While not every student-athlete will be

elected to public office, many will be leaders in their communities and workplaces, and will bring their experiences as members of diverse communities to these roles, benefitting all those around them.

One such leader is Jim Cash. In 1965, Cash signed a letter-of-intent to play at Texas Christian University, becoming the first African-American basketball player to do so in the Southwestern Conference. An Academic All-American as a math major, Cash went on to earn a Ph.D. from Purdue University and to teach at Harvard Business School. He has served on boards for large companies all over the country, including Microsoft, General Electric, and State Street, and for outstanding charities like Massachusetts General Hospital and the Museum of Science in Boston. Highland Capital Partners, James Cash, Ph.D., Special Advisor Biography, http://tinyurl.com/psu5by5 (last visited Oct. 25, 2015).

In the 1970s, Title IX expanded opportunities for women in college athletics, further increasing opportunity on college campuses. In the early 1980s, Robin Roberts played basketball at Southeastern Louisiana University, where she scored more than 1,000 points and grabbed over 1,000 rebounds. Her broadcasting career, both at ESPN and ABC's "Good Morning America," has been a model for young women; her courage battling both breast cancer (diagnosed in 2007) and myelodysplastic syndrome (diagnosed in 2012) has been inspiring for Americans of all ages. ABC News, Robin Roberts Biography, http://tinyurl.com/74ugq2t (last visited Oct. 25, 2015).

Finally, we turn to another example of diversity in our game. Adreian Payne lost his mother—a single

parent[25]—at age 13, was diagnosed with a learning disability as a freshman in high school, and spent much of high school trying to catch up to grade-reading level to be able to play college basketball. He was recruited to Michigan State by amicus Tom Izzo, and struggled his first few years academically and athletically. He lost his grandmother (who became his caretaker after his mother died) during his junior year, and he lost eight-year-old Lacey Holsworth (a local cancer victim who wore his jersey to every home game) during his senior year. Jason King, *The Adreian Payne Story: How Michigan State Star Became the Ultimate Role Model*, Bleacher Report (Feb. 5, 2014), http://tinyurl.com/l3u6ryk. Payne nonetheless became a first-round draft pick in the NBA and an Academic All-Big Ten selection in 2014. Payne represents not only the type of diversity that we celebrate, but his overcoming of adversity is another form of leadership. *Ibid.*

The point is not just the ultimate career trajectory of the individuals we have highlighted here, who are each prominent and influential people. It is just as important to remember the other teammates and classmates who met, interacted with, and ultimately were influenced by, each of these individuals—and the many others like them. Again, our teams are microcosms of

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[25] Payne's father was incarcerated for much of his childhood; student-athletes without two parents are another element of diversity that we often see. See, *e.g.*, Gary Parrish, *The Shaping of Shaka*, CBS Sports (Dec. 3, 2014), http://tinyurl.com/oo73l9h (Amicus Shaka Smart's father left at age 2, returned briefly, and left again for good during his senior year of high school; nine of the players on his Virginia Commonwealth roster last year were likewise raised without fathers).

the university community, and without the types of diversity that we support today throughout the university community, some of these individuals—and the lessons that they taught and learned simply by being part of the student body—would be lost. And our Nation would be the worse for it.

II. RETREATING ON DIVERSITY COULD HAVE DIRE CONSEQUENCES

Our occupation gives us a unique perspective on the challenge facing this Court today. We stand with one foot in the halls of academia, and another in the urban areas where opportunity is too often lacking. For us, places like Ferguson, Missouri and Baltimore, Maryland are not just troubling images on the nightly news, but places where we go to recruit prospective student-athletes. See Julie Bosman & Alan Blinder, *Missouri Orders Nightly Curfew to Quell Looting*, N.Y. Times, Aug. 17, 2014, at A1; Sheryl Gay Stolberg, *Clashes Rock Baltimore After Funeral; Curfew Is Set*, N.Y. Times, Apr. 28, 2015, at A1. Events like the recent racially-motivated massacre in a Charleston, South Carolina church become somber discussions with our student-athletes. See Richard Fausset, *Open Doors and Lingering Pain at Charleston Church Where 9 Were Killed*, N.Y. Times, Oct. 19, 2015, at A1.[25]

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[25] This dialogue is nothing new. Dean Smith again:

> I talked often to my players about Dr. King and quoted him frequently * * *. Two [quotes] that come to mind are "Those who sit at rest buy their quiet with disgrace" and "Injustice anywhere is a threat to justice everywhere."

Smith, at 96.

We can also see that although sports are powerful symbols, they are not enough by themselves to change a society. Our teams are often highly visible examples of diversity, but they cannot represent *all*—or even most—of the diversity in a community, academic or otherwise. Shortly after California passed Proposition 209, which prohibits the use of race in admission, the freshman class at UCLA had just 96 African Americans out of a class of 5,000, *including* recruited athletes. Rebecca Trounson, *A Startling Statistic at UCLA*, L.A. Times, June 3, 2006, at A1.

The risk of a UCLA-like outcome—that African-American admittance is gutted and effectively the only "diversity" on campus is from recruited athletes—is a real and troubling prospect if this Court rejects the UT-Austin admissions program. The UCLA outcome will mean that both minorities and non-minorities will lose out—both groups will fail to obtain the values that we have been discussing above. And it is not enough to have the only diversity be on a court or ballfield, as we can see in other parts of the world.

France hosted the soccer World Cup in 1998 and fielded a team that seemed to represent a new, multicultural French populace. *Les Bleus* were led by Zinedine Zidane, son of Algerian immigrants, and featured Thierry Henry, whose mother came from Martinique, and Lilian Thuram, who was born in Guadeloupe in the Caribbean. While Jean Marie Le Pen, leader of the right-wing National Front, criticized[27] the team pri-

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[27] Le Pen described the players as "foreign mercenaries who 'don't sing the Marseillaise, or ignore it.'" Simon Kuper, *Racism Lives*

or to the tournament, the rest of the country embraced it, especially after the team won the World Cup:

> Henry, who was the new kid to the squad at 20 years old, still recalls, wide-eyed, an elderly French woman thanking him for giving the nation its greatest moment since the Liberation.

Andrew Hussey, *Les Temps Modernes*, The Observer, Apr. 2, 2006, at 24.

French politicians raced to embrace the victorious team, although the sentiment seemed more-than-a-little convenient:

> [E]ven Jacques Chirac, a haughty classical bourgeois of the right, wore the colours of his national team; on the left, the former Minister for Culture, Jack Lang, known mostly for highbrow tastes and disdain for proletarian culture, said that he had dreamed of such a moment throughout his career.

Hussey, at 24.

France, it should be noted, was officially a "color-blind"[28] society, and had no public policies "target[ing] benefits or confer[ing] recognition on groups defined as races." Erik Bleich, *Race Policy in France*, Brookings Institution (May 2001), http://tinyurl.com/ppopgyl.

On in France as World Cup Win Fades, Financial Times, Nov. 12, 2006, at 6.

[28] Consistent with Petitioner's position here.

Nor were any more-inclusive policies proposed, or passed, in the wake of the World Cup victory.

Diversity remained an enduring French value only on the soccer pitch. The nation as a whole remained highly-segregated and polarized. This tension was highlighted in an October 2001 match (a "friendly") with Algeria. Scheduled just a few weeks after 9/11, kids waving Algerian flags taunted Zidane as a "traitor"; the match was halted in the second half when fans poured on to the pitch. Zidane later said it was the "worst day in my career." Hussey, at 24.

A year later, Le Pen finished second in the first round of French Presidential elections. Both the team and its leader (Zidane) spoke out against the ugly racism in which Le Pen and others in the National Front had engaged. While Le Pen did not win the second round, the fact that he came as close as he did showed the fault lines within French society. Kuper, at 6.

In fact, France's color-blind policies likely precluded opportunities for immigrants in different fields:

> Patrick Weil, political scientist at the university of Paris 1-Sorbonne, [said] * * *: "I never thought the World Cup '98 [win] was such a big event, because immigrants had always been presented as successful in sport, culture, music. The problem was not in these fields but in business, politics."

Kuper, at 6.

Moreover, just in the past year, France has seen a marked increase in racial and religious-based violence.

In January 2015, 17 people were killed at the editorial offices of the magazine "Charlie Hebdo," and a subsequent attack at a Jewish supermarket. Andrew Higgins & Dan Bilefsky, *French Gunmen Die in Raids*, N.Y. Times, Jan. 10, 2015, at A1. In June 2015, there was an explosion and beheading at an American-owned chemical plant. Aurelien Breeden & Alissa J. Rubin, *French Authorities Hold Suspect in Beheading and Explosion at Chemical Plant*, N.Y. Times, June 27, 2015, at A8. While this high-profile violence grabbed the world's attention, there has been decades-long tension between the new immigrant communities and the rest of French society. The polarization of French society is both racial and religious; in 2014 in France, more than half of all "racist attacks targeted Jews." Jeffrey Goldberg, *Is It Time for the Jews to Leave Europe?*, The Atlantic 63, 64 (Apr. 2015); see also Youssef M. Ibrahim, *'Arab Girls' Veils at Issue in France*, N.Y. Times, Nov. 12, 1989, at A5; Elaine Sciolino, *In French Suburbs, Same Rage, but New Tactics*, N.Y. Times, Nov. 28, 2007, at A1.

The lesson to be learned from events in France is that diversity only in sports is not enough. While French politicians paid lip-service to *Les Bleus*, the rest of French society remained unchanged. And when the glow from the World Cup faded, the ugly polarization emerged. Although Le Pen has ceded the leadership of the National Front to his daughter, his ideas remain an uncomfortable part of the French polity.

But it is true that sports can help change a culture, if the culture is ready to change and the leadership is committed. In that case, sports can strengthen and expand a commitment to diversity. One political leader

who understood the power of sports, working in connection with government, to help effect change was Nelson Mandela. Mandela understood that sports could symbolize, embody and stimulate change in the larger society. Mandela once said:

> Sport has the power to change the world. It has the power to inspire, the power to unite people that little else has. It is more powerful than governments in breaking down racial barriers.

John Carlin, *Playing the Enemy: Nelson Mandela and the Game that Made a Nation* 4 (2008).

Rugby was wildly popular among whites during the apartheid years, and not surprisingly extremely unpopular among the black majority; one of the key successes of the African National Congress (ANC) was the successful enactment of a rugby boycott in the 1980s. Carlin, at 66. Mandela, of course, remained at Robben Island during this period, part of the 27 years he was imprisoned, much of it on death row. Nelson Mandela, *Long Walk to Freedom* 381 (1995).

After his release from prison in 1990, Mandela began negotiating the transfer of power from the white-only regime. He understood that trust needed to be established for the minority white government to cede power in an environment where violence was in the air, and potentially coming from both sides. He was able to use the promise of a return to rugby international competitions—starting with a 1992 match against New Zealand in Johannesburg—to help smooth the transition. Carlin, at 112.

When South Africa was offered the chance to host the 1995 Rugby World Cup, Mandela saw a chance to continue the healing. To his ANC colleagues who did not trust the whites, Mandela argued that "rugby was worth, as he put it, several battalions. 'My idea was to ensure that we got the support of the Afrikaners, because—as I kept reminding people—rugby, as far as Afrikaners are concerned, is a religion.'" Carlin, at 113.

South Africa hosted the 1995 World Cup, a competition that culminated with the home Springboks playing New Zealand, the defending world champions. Mandela, then newly-installed President, came to see the match, as expected. What was surprising was what he was wearing:

> He was wearing the green Springbok cap and the green Springbok jersey * * *. The symbolism at play was mind-boggling. For decades Mandela had stood for everything white South Africans most feared; the Springbok jersey had been the symbol, for even longer, of everything black South Africans most hated.

Carlin, at 221-223.

Morne' du Plessis, a former captain of the Springboks during the "bad old days,"[29] recalled his reaction when Mandela arrived at the stadium to thunderous crowds:

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[29] His father had also been the Springbok captain in the 1940s. Carlin, at 78-79.

> I don't think I'll ever experience a moment like that again. It was a moment of magic, a moment of wonder. It was the moment I realized that there was a chance this country could work.

Carlin, at 221. For Mandela, rugby—more specifically the World Cup held in South Africa—was the vehicle to help unify and heal a post-apartheid nation. By wearing the Springbok uniform, he had gone more than halfway, in effect saying, "We are all South Africans—white and black alike. We are all on the same team." Unlike the cynicism of the French politicians, Mandela's embrace of the Springboks had enormous personal meaning; he was willing to forgive, both on behalf of his people, but also on behalf of himself and the years that he lost on Robben Island. It is also not unimportant that Mandela's embrace of the team occurred *prior* to the final—a game in which the Springboks were massive underdogs.[20] *Id.* at 207. And while South Africa's problems and challenges remain, two decades later, the nation has made remarkable progress from where it was in the early 1990s.

If South African rugby shows the power of sport, French soccer warns us of its limits. If we move to policies that echo UCLA's admissions in 2006, we risk having teams like *Les Bleus*—with paper-thin diversity and without the underlying understanding that a modern nation needs. It is the knitting together of our dif-

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[20] Mandela learned the players' names and positions as well; the authenticity of Mandela's actions may have been influenced, at least in part, by his own athletic background, as he was an amateur boxer as a young man. Carlin, at 8.

ferences—and the appreciation and understanding that comes from the presence of "real" diversity—that allows true growth.

Finally, we turn back from international sport to our own Nation. Tolerance and diversity are not "conservative values" or "liberal values." They are not "Democratic values" or "Republican values." They are not "black values" or "white values." They are American values.

And they are values that we respect, whenever we see them in action, on the basketball court, or anywhere else in American life. Here's how President Gerald R. Ford was eulogized by then-President George W. Bush:

> Long before he was known in Washington, Gerald Ford showed his character and his leadership. As a star football player for the University of Michigan, he came face to face with racial prejudice. When Georgia Tech came to Ann Arbor for a football game, one of Michigan's best players was an African-American student named Willis Ward. Georgia Tech said they would not take the field if a black man were allowed to play. Gerald Ford was furious at Georgia Tech for making the demand and at the University of Michigan for caving in. He agreed to play only after Willis Ward personally asked him to. The stand Gerald Ford took that day was never forgotten by his friend. And Gerald Ford never forgot that day either.

President George W. Bush, Eulogy for President Ford (Jan. 2, 2007).

CONCLUSION

We request that this Court honor the values of diversity and inclusion and affirm the judgment below.

Respectfully submitted,

Richard D. Batchelder, Jr.
Samira A. Omerovic
ROPES & GRAY LLP

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Counsel for Amici

NOVEMBER 2015

APPENDIX

APPENDIX

Lennie Acuff
Natasha Adair
Jody Adams
Cy Alexander
Carol Alfano
Anthony Alfaro
Dana Altman
Tommy Amaker
Mike Anderson
Anthony Andre'
Jana Ashley
Karen Aston
Scott Ballard
Karen Barefoot
Rod Barnes
Janet Berry
David Bike
Ed Bilik
Chris Boettcher
Joan Bonvicini
Robert Booher
Mark Boyle
Todd Anthony Bozeman
Anthony Bozzella
Tracey Braden
Mike Brey
Charles Brock
William Brown
Al Bruehl
Douglas Bruno
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